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91-140

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1991

AVERY BARBER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence of a state of mind allegedly to distribute narcotics is sufficient, without proof of an overt act to evidence the actual intent of the parties, there being a conflict among the circuits, concerning the need for an overt act, some requiring an overt act and others, not?

2. Does due process of law require evidence of an overt act to support a conviction for a narcotics conspiracy, not as a substantive ingredient of the crime, but rather as an eviddentiary requirement to prove that there was criminal intent rather than mere idle talk, protected by the First Amendment?

3. Is the First Amendment violated by a conviction for conspiracy to violate the drugs laws, based on negotiations for drug trafficking, without proof of any overt act or objective evidence of criminal intent to execute the alleged transaction?

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UNOFFICIAL REPORT OF OPINION

On the 23rd day of May, 1991, the United States Court of Appeals for the Third Circuit did enter an order on a memorandum opinion, a copy of which is annexed to the appendix herein, affirming a judgment entered on the 8th day of January, 1991, in the United States District Court for the District of New Jersey (Lechner, J.), sentencing petitioner to a term of 165 months, plus five years special parole and fifty dollar assessment on his conviction for conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. 846.

GROUNDS FOR JURISDICTION

Jurisdiction is hereby invoked pursuant to 28 U.S.C. 1254.

DATE OF JUDGMENT

The judgment of the United States Court of Appeals for the Third Circuit was filed May 23rd, 1991, which did affirm the judgment of conviction entered the 8th day of January, 1991 in the United States District Court for the District of New Jersey (Lechner, J.), sentencing petitioner to a term of one hundred sixty five months of incarceration, five years of special parole and fifty dollar assessment, on his conviction for conspiracy to possess with intent to distribute a controlled substance, to wit, cocaine, in violation of 21 U.S.C. 846.

STATUTORY PROVISION TO BE REVIEWED

21 U.S.C. 846, which provides, as follows:

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S.C. 841 provides, as follows:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

STATEMENT OF THE CASE

Petitioner was indicted on a single count indictment, charging him and Warren Gore with conspiracy

to possess heroin, with intent to distribute in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846, a copy of which is annexed in the petition.

The case against petitioner rested solely on telephone tapes, that came from court ordered electronic surveillance of the telephone of one Warren Gore, which conversations were unexpectedly intercepted, but never independently investigated, in the course of an investigation of the distribution of narcotics in the State of New Jersey. Warren Gore was not indicted with petitioner, but with the others who were under specific investigation, so that petitioner was indicted alone and brought to trial alone.

Michael Kula, a Drug Enforcement Agent testified at trial that one of the voices on the telephone tapes was that of Barber. Agent Michael Pastercheck, a drug trafficking specialist, testified that the recorded conversations, which were played for the jury, related to a proposition by petitioner to Warren Gore, to sell the latter heroin imported from his alleged contact in Pakistan and to set up an apartment in New Jersey, to where deliveries would be made. Despite the fact that these conversations were carried on for more than one month, there was no evidence that any overt act was committed, nor that petitioner had the capacity to deliver drugs. The Government made no independent investigation to determine the actual "state of mind" of petitioner, whether the intercepted conversations represented actual preliminary negotiation by a person capable of obtaining and selling drugs, or mere idle, undesirable conversation, protected, however, by the First Amendment. Although petitioner spoke of a connection in Pakistan to obtain drugs, it would appear more likely than not that such alleged connection was illusory, given that he never managed to obtain drugs from any source. The conversation concerning the rental of a safe house

would appear to be just as illusory, since there was no evidence that such type real estate had ever been rented or purchased by petitioner.

In its summation, the Government conceded that heroin had never been supplied to Gore, arguing, "Only for reasons that were beyond the defendant's control was he unable to get the heroin that he had promised Gore. This makes a classic conspiracy." (Tr. T., 333). Indeed, the Government's witness, on cross examination, testified that in his opinion, the conversation would indicate that petitioner never did go out to get heroin. (Tr. T. 281)

Petitioner was convicted by a jury and sentenced to a term of one hundred sixty five months, predicated upon a conspiracy to sell heroin, a conspiracy that never materialized and that did not involve the commission of any overt acts that might raise an inference of criminal intent. Indeed, petitioner requested that the Court charge the jury that without evidence of an overt act, a conviction for conspiracy would not lie, a request to charge that the Court refused. (Tr. T. 250-1)

Therefore, it is more likely than not, that petitioner stands convicted for no more than the exercise of undesirable speech, which is precisely the type of utterance that the First Amendment is intended to protect. Thus, petitioner was sentenced to a term of one hundred sixty five months, based upon discussions of one half kilo of heroin, without any evidence that petitioner had the capacity to make such quantity delivery. Guidelines have been arbitrarily fixed in this case.

THE DECISION

The decision of the Court below, while discussing the challenge of petitioner to the sufficiency of the evidence, as well as other issues, did not come to grips with the challenge to the sufficiency of evidence, by the absence of proof of an overt act or the refusal of the trial Court to instruct the jury as to the necessity thereof, as raised in Points One and Three of the brief on appeal. These issues had been preserved by objections, a Rule 29 motion and a request to specifically charge.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari to resolve the discrepancy among the Circuit Courts of Appeals, whether a narcotics conspiracy conviction can be supported without evidence of an overt act and whether First Amendment rights are implicated, where a conviction stands on the exercise of pure speech, as undesirable as it may be, which does not represent any present danger.

In *Yates* v. *United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356, the Supreme Court held that evidence of an overt act in a conspiracy prosecution does not supply an essential ingredient of the crime of conspiracy, but rather, is evidence whether "the conspiracy is at work," the Court writing:

> "The function of the overt act in a conspiracy prosecution is simply to manifest that the conspiracy is at work. . . . and neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." (354 U.S. at 334; 77 S.Ct. at 1085."

The Second Circuit requires proof of an overt act to support a conviction for conspiracy, reading the requirement from 21 U.S.C. 846, which punishes an "attempt" and "conspiracy", only where a proof of both "intent" and "a substantial step (which) must be something more than mere preparation." Thus, the statute, although not using the phrase "overt act", by its terms requires some act, in the nature of a "substantial step, as proof of a conspiratorial intent to commit the "substantial step, as proof of a conspiratorial intent to commit the "substantive crime." *United States* v. *Martinez,* 775 F.2d 31 (2nd Circ., 1985). A mere discussion of a possible narcotics deal, without doing anything about it, is as much protected by the First Amendment, as any other socially undesirable speech, for the simple reason that from pure speech, it is impossible to determine the intent and capability of the speaker.

Again, in the Second Circuit, in *United States* v. *Del Vecchio,* 816 F.2d 859 (2nd Circ., 1987), the defendant progressed beyond what occurred in the case at bar, the Court still finding it was not sufficient to constitute an attempt, listing, "that the proof at best established that appellants sought out DiChiara, a supplier of narcotics; attempted to contact DiChiara by sending him flowers; met with DiChiara on May 11 and 17, 1983; and agreed on the price for five kilograms of heroin, the terms of payment and the date and time of the proposed transaction," which, of course constituted overt acts, but not sufficiently referable to the conspiracy, to provide evidence thereof. In reversing a judgment of conviction, the Court wrote that, "the Government failed to establish, however, that appellants performed any overt act to carry out the agreed purchase." In short, the Second Circuit held that an overt act must be so referable to the execution of the substantive crime, that proof thereof, clearly establishes

the intent of the defendant, as distinguished from idle banter.

The Tenth Circuit, likewise, has held that conspiratorial declarations, without evidence of an overt act, is not criminally punishable "Conspiracy is not punishable as a state of mind and becomes punishable only if completed by an overt act by one or more of the conspirators." *United States* v. *King,* 521 F.2d 61 (10th Circ., 1975)

The Ninth Circuit similarly requires evidence of an overt act, necessary to support a conspiracy conviction. *United States* v. *Melchor-Lopez,* 627 F.2d 886 (9th Circ., 1980).

The Eleventh Circuit requires evidence of an overt act to support a conspiracy charge, holding that conspiratorial declarations, without more, are no more than preliminary negotations. *United States* v. *Jones,* 765 F.2d 996 (11th Circ., 1985)

On the contrary, and the fundamental reason why certiorari should be granted is that there is a conflict among the Circuits, some of which do not agree with the Second, Ninth and Eleventh Circuits, which require proof of overt acts. One among them is the Seventh Circuit which "does not require allegation or proof of an overt act in furtherance of a drug conspiracy." *United States* v. *Umentum,* 547 F.2d 987 (7th Circ., 1976).

The First Circuit would seem to align itself with those circuits, not requiring evidence of an overt act to support a conspiracy conviction, although the recital appears to be mere dicutm. *United States* v. *Cruz,* 568 F.2d 781 (1st Circ., 1978).

Finally, the Third Circuit, from whence this case comes, has held that proof of an overt act is not an essential to a drug conspiracy conviction. *United States* v. *Bey,* 736 F.2d 891 (3rd Circ., 1984). However, in that

case, there was an overt act, the Court merely holding that it was not necessary to instruct the jury concerning overt acts, giving as its reason the lack of requirement of an overt act to prove a drug conspiracy. Yet, one year earlier, the Third Circuit wrote in *United States* v. *Nolan,* 718 F.2d 589 (3rd Circ., 1983), that "the overt acts proven were all relevant to showing a conspiracy and were, together with other evidence introduced by the Government, sufficient to show the existence of the conspiracies alleged." Indeed, in *United States* v. *Everett,* 700 F.2d 900, 907 (3rd Circ., 1983), the Court wrote, "to prevent mistaken convictions, the Government must introduce some measure of objective evidence corroborating the attempted distribution of a controlled substance. . . . That (Fifth) Circuit shared our concern that the crime of attempt not be used to 'punish one's thoughts,' desires or motives, through indirect evidence, without reference to any objective fact." Thus, although the Third Circuit has used language tending to dispense with any requirement of evidence of overt acts, as objective evidence of criminal attempt in charges of drug conspiracies, nevertheless, the Circuit sometimes uses other language, which impliedly recognizes First Amendment implications for convictions resting upon pure speech.

In *Dennis* v. *United States,* 241 U.S. 494, 71 S.Ct. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951), this Court came to grips with the perceived threat of Communism, which was thought of, as dangerous to survival of the nation as drugs are today. Nevertheless, the Court held that membership in the Communist party was not sufficient to support a charge of conspiracy, without an overt act. The same free speech principle should taint a conviction, where a defendant engages in anti-social drug related conversations, but commits no act to reflect criminal intent. There would be no need for the

First Amendment for protection against the exercise of speech concerning popular subject matter. The First Amendment stands as a bulwark against prosecution for socially undesirable speech, as in the case at bar. Advocacy of unpopular conduct is not the same as execution thereof. The former is privileged. The latter is not. Absent overt acts, the speech of petitioner in the case at bar, as socially undesirable as it might be, was privileged.

Thus, there are two basic reasons for granting certiorari. The first, of course, is to resolve the conflicts among the circuits. The secondis to determine how far criminal prosecutions of drug conspiracies can go, without impinging upon First Amendment guarantees.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

AVERY BATTLE

Crim. No. 90-316 (AJL)
21 U.S.C. §846

INDICTMENT

The Grand Jury in and for the District of New Jersey, sitting in Neward, charges:

1. Between on or about October 1, 1989 and on or about June 27, 1989, at Newark, in the District of New Jersey, and elsewhere, the defendant

AVERY BATTLE

did knowingly and intentionally combine, conspire, confederate and agree with others, including Warren Gore a/k/a "Naieem," to distribute and to possess with intent to distribute heroin, a Schedule I narcotic drug controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a)(1).

2. It was a part of the conspiracy that defendant AVERY BATTLE and others would obtain relatively pure heroin from suppliers outside New Jersey.

3. It was also a part of the conspiracy that defendant AVERY BATTLE and others would transport the heroin or have it transported to their associates in New Jersey.

4. It was also a part of the conspiracy that defendant AVERY BATTLE and others would dilute the heroin with "cutting agents" to increase the amount of the heroin and their profits, package it in smaller

amounts and resell it to their customers.

5. It was also a part of the conspiracy that defendant AVERY BATTLE and others would locate and obtain "stash houses" where they would store their heroin and heroin proceeds and from which they would deal their heroin.

6. It was also a part of the consiracy that defendant AVERY BATTLE and others would organize their sales network by assigning the "runners" and salespersons to supply heroin in areas of Newark and northern New Jersey and would provide these associates with amounts of heroin for resale to customers.

7. It was also a part of the conspiracy that defendant AVERY BATTLE and others would use the telephone and digital pagers ("beepers") to conduct and coordinate their heroin distribution organization.

In violation of Title 21, United States Code, Section 846.

A TRUE BILL

FOREPERSON

MICHAEL CHERTOFF
United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5040

UNITED STATES OF AMERICA,

v.

AVERY BARBER

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Cr. No. 90-00316)
District Judge: Hon. Alfred J. Lechner, Jr.

Submitted Under Third Circuit Rule 12(6)
May 13, 1991

BEFORE: Hutchinson, Cowen and Seiz
Circuit Judges

(Filed MAY 23 1991)

MEMORANDUM OPINION

COWEN, *Circuit Judge.*

This appeal follows from the conviction and sentencing of defendant Avery Barber for conspiracy to distribute heroin. Barber raises a number of issues relating to the admissibility of evidence, the sufficiency of evidence, and the propriety of his sentence. Because we find nothing in Barber's arguments which warrants reversal or a new trial, we will affirm the judgment of the district court.

I.

After a jury trial, Barber was found guilty of conspiring with Warren Gore and other unnamed individuals to distribute heroin. 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846. The case against Barber consisted primarily of transcripts of telephone conversations obtained pursuant to court-authorized wiretaps. Michael Kula, a Drug Enforcement Agency ("DEA") agent, testified that one of the voices on the telephone tapes was Barber's. DEA agent Michael Pasterchick, a drug trafficking expert, testified that the recorded conversations indicated a conspiracy to distribute one-half kilogram of heroin smuggled into the country from Pakistan.[1] For his role in the conspiracy, Barber was sentenced to 165 months in prison, five years of supervised released, and a special assessment totalling fifty dollars. Barber then appealed.

II.

Several of Barber's arguments before us center on the admissibility of certain pieces of evidence. First, he contends others should have been suppressed because earlier tapes were sealed. The government sought and received in this case two orders from the district court authorizing wiretaps. After the initial order expired, the government sealed the tapes produced by that order. *See* 18 U.S.C. § 2518(8). Thereafter, the government received the second order. This second wiretap revealed Barber's involvement in the conspiracy.

Barber seems to argue that once tapes are sealed,

1. Barber was arrested before actually obtaining and distributing the one-half kilo of heroin.

another wiretap order may not ensue from the investigation which produced those initial tapes. Thus, Barber claims that the tapes obtained from the second wiretap should have been suppressed, since the authorizing order was improperly issued. We disagree. Neither 18U.S.C. § 2518 nor case law requires that the government only seal tapes upon concluding an investigation, and we see no reason to create such a rule. The purpose of section 2518 is to maintain the physical integrity of wiretap tapes. This purpose would hardly be served if the government is required to refrain from sealing tapes until it is convinced that an investigation has come to an end. Indeed, important tapes may be left unsealed for years. Under the circumstances, the government's action was not only legal, but prudent.

Alternatively, Barber suggests that the request for a second wiretap was based on stale information, and therefore should not have been granted. Much of the information which supported the government's application for the second wiretap order was obtained from conversations recorded as a result of the first wiretap, which had ended a few weeks earlier. In the context of a long-term drug conspiracy, however, we cannot say that information acquired several weeks prior to the application for a wiretap order and relied upon in that application is stale. *See United States v. Harris,* 482 F.2d 1115, 1119 (3rd Cir. 1973).

Barber also raises several challenges to Agent Pasterchick's testimony. Pasterchick's testimony was not objected to at trial, so we review these challenges only for plain error. Fed. R. Crim. P. 52(b); *United States v. Thame,* 846 F.2d 200, 204 (3rd Cir.), *cert. denied,* 488 U.S. 928 (1988). To begin, Barber asserts that Pasterchick, in discussiong the tapes, improperly identified speakers other than he. But the other speakers were not defendants in this case; an improper

identification would not prejudice Barber provided the tapes were accurate. SInce Barber had already stipulated to th tapes' accuracy, we are unable to find plain error. Additionally, Barber contends that Pasterchick testified as to Barber's intent, and that such testimony was inadmissable hearsay. However, the record reflects that Pasterchick actually resisted defense efforts to get him to comment on Barber's *mens rea.* Finally, there is a suggestion by Barber that Pasterchick's expert testimony should have been disallowed. This argument has no merit, since Pasterchick's testimony was necessary to understand the coded language used by drug dealers, *United States v. Dicker,* 853 F.2d 1103, 1108-09 (3rd Cir. 1988); Fed. R. Evid. 702, and since Pasterchick was qualified as an expert by virtue of his extensive knowledge and training.

There are a few other pieces of evidence which Barber contends should not have been admitted. At trial, there was testimony regarding an attempt by Gore to sell cocaine to Barber, which Barber now argues should have been excluded under Fed. R. Evid. 403. But this evidence was clearly admissible under Fed. R. Evid. 404(b) as proof of intent and knowledge. *See United States v. Traitz,* 871 F.2d 368, 389 (3rd Cir. 1989). Moreover, given Barber's pre-trial stipulation that Gore was a drug dealer, it is difficult to conceive how the evidence was inflammatory. Barber also argues that the jury should not have been informed of evidence seized from Gore's apartment. Because this evidence was relevant to proving the conspiracy between Gore and Barber, though, it was clearly admissible.

In a final evidence-related argument, Barber claims that he was denied an evidentiary hearing concerning the government's identification procedures. Whatever request was made for such a hearing, though, was subsequently withdrawn. Even if a hearing was re-

quested, the information that Barber hoped to obtain during such a hearing could easily have been brought out on cross-examination of the government witnesses. It is difficult to conceive, then, how Barber was prejudiced by the lack of a hearing.

III.

Another group of arguments raised by Barber focus on the sufficiency of the eivdence. First, he contends that there was insufficient evidence to indicate that he entered into an agreement. Rather, claims Barber, the evidence only indicates that he was involved in preliminary negotiations to distribute cocaine, and that such proof cannot sustain a conspiracy convication. Barber finds support for his position in the fact that he was unable to obtain the heroin which was to be distributed.

We are required to affirm the verdict of the jury if it is backed by substantial evidence. All evidence is to be viewed in a light most favorable to the government. *United States v. Leon*, 739 F.2d 885, 890 (3rd Cir. 1984). At the core of a conspiracy is an agreement. *See United States v. Kates*, 508 F.2d 308, 310 (3rd Cir. 1975). That agreement is characterized by the parties' specific intent to commit a prohibited act. *See United States v. Klein*, 515 F.2d 751, 753 (3rd Cir. 1975). In the context of a conspiracy to distribute drugs, proof of an overt act is not necessary. 21 U.S.C. § 846; *United States v. Bey*, 736 F.2d 891, 895 (3rd Cir. 1984).

Applying these principles, it is apparent that sufficient eviddence exists to uphold Barber's conviction. It was demonstrated at trial that Barber was a participant in the wiretapped conversations. Given the tapes and Agent Pasterchick's testimony, there was also sufficient evidence to find that Barber intended to distribute

heroin. Barber's contention that the evidence proves only that preliminary negotiations were underway is unfounded. He met with his supplier in Los Angeles and New Jersey, conversed frequently with people in Pakistan and Los Angeles, and made arrangements to establish a stash house in New Jersey. These are not the acts of someone engaged in preliminary negotiations. That Barber was unable to obtain the heroin is of no relevance, since an agreement to distribute the heroin had clearly been reached, and since the conspirators apparently believed that heroin could be obtained. In short, sufficient evidence existed to convict Barber for conspiracy to distribute heroin.

Barber also argues that Wharton's Rule bars his conviction for conspiracy. But in *United States v. Bommarito,* 524 F.2d 140 (2d Cir. 1975), the Court of Appeals for the Second Circuit held that Wharton's Rule does not apply to narcotics conspiracies. We adopt this view. *See also Ianelli v. United States,* 420 U.S. 770 (1974).[2]

IV.

Finally, Barber challenges the propriety of his sentence. The district court sentenced Barber to 165

2. Even if Wharton's Rule did apply to drug conspiracies, it still would not serve as a bar to Barber's conviction. The Rule does not apply where more than the number of people needed to effectuate the substantive offense underlying the conspiracy actually participate in that conspiracy. *See Ianelli v. United States,* 420 U.S. at 782 n.15; *United States v. Bommarito,* 524 F.2d at 144. Here, only two people are necessary to distribute drugs, which is the underlying offense. However, the evidence in this case indicates that more than two people were involved in the conspiracy—Barber, Gore, the suppliers in Los Angeles and Pakistan, and couriers. Therefore, Wharton's Rule does not help Barber.

months in prison, based on a Criminal History Category of VI and a base offense level of 28. In calculating the base offense level at 28, the district court took into consideration the one-half kilo of heroin that was negotiated for, but not actually obtained. Barber believes that this was erroneous. However, the Sentencing Guidelines sanction the district court's calculation of the base offense level. *See* U.S.S.G. § 2D1.4 ("if a defendant is convicted of a conspiracy or an attempt to commit an offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed."); U.S.S.G. § *2D1.4, comment. (n.1) (if "the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount."). The sentence given to Barber is therefore proper.*

V.

We find Barber's other arguments on appeal to be similarly unavailing. For all of the above reasons, we will affirm the judgment of the district court in its entirety.

TO THE CLERK OF THE COURT:

Please file the foregoing Opinion.

s/ Circuit Judge